2006

Curtis J. Beller v. Nanetter Rolfe, Director, Utah State Driver License Division : Brief of Appellant

Utah Court of Appeals

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ORIGINAL

IN THE UTAH COURT OF APPEALS

CURTIS J. BELLER, Petitioner/Appellant, v. NANETTE ROLFE, Director, Utah State Driver License Division, Respondent/Appellee.	Case No. 20060641

OPENING BRIEF OF APPELLANT

This is the opening brief of appellant on appeal from a final order entered by the Honorable Tyrone E. Medley of the Third District Court of Salt Lake County, State of Utah, following judicial review of the Driver's License Division's revocation of Beller's driver's license.

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(a) and/or (b) provide this Court's jurisdiction over this appeal from the district court's judicial review of the adjudicative proceedings conducted by the Driver License Division.

STATEMENT OF ISSUES

1. Did the district court correctly rule that Officer Kendrick violated the Fourth Amendment in stopping Beller absent reasonable suspicion?

Standard of review: The trial court's findings of fact are entitled to substantial deference and will be reversed only for clear error, whereas application of the law to the facts is subject to the *de novo* standard of review. E.g., Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah App. 1996).

The issue was raised and ruled on in the trial court (R. 34-38, 64-66).

2. Did the district court err in ruling that the Federal and Utah Constitution's exclusionary rules have no application to a driver license revocation proceeding?

Standard of review: This issue is one of law, to be reviewed for correctness. See, e.g., State v. Pena, 869 P.2d 932, 936 (Utah 1994).

The issue was waived by the Division before the hearing officer (R. 53-55). Beller properly responded and preserved his claims when the Division tardily raised the issue in the trial court (R. 43, 53-59, 62-69).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The governing constitutional provisions, statutes and ordinances are in the addendum.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

Beller petitioned the Third District Court for judicial review of the Driver License Division's revocation of his driver's license, pursuant to Utah Code Ann. § 41-6a-521 (R. 1-2). Following an evidentiary hearing (R. 79 at 3-16), Beller submitted a memorandum arguing that the officer's violation of his Fourth Amendment rights required reinstatement of his driver's license (R. 32-40). The Division argued in opposition that there was no violation of Beller's Fourth Amendment rights, and that the exclusionary rule did not

apply (R. 41-48). In reply, Beller argued that the Division had waived any claim that the exclusionary rule did not apply, and that the exclusionary rule did apply (R. 53-60).

Judge Medley ruled that the officer who stopped Beller did violate the Fourth Amendment, but that the exclusionary rules provided by the Utah and Federal Constitutions have no application to the Driver License suspension hearing (R. 62-69).

Beller filed a timely notice of appeal (R. 71).

STATEMENT OF FACTS

On July 1, 2005 at about 1:00 a.m., Officer Kendrick of the Salt Lake City Police Motorcycle Squad was involved in a traffic stop at 831 South 300 West with two other motorcycle officers, Martinez and Baldwin (R. 79: 3-4). Two motorcycles drove by and Kendrick felt that the one with an illuminated engine, Beller's motorcycle, was extremely loud (R. 79: 4).

Although he had no equipment with him to measure sound and could not see the make of the motorcycle, Kendrick felt that Beller's muffler violated Salt Lake City ordinance 12-2100,[1] which forbids people to alter their mufflers in any way that changes the pitch or tone (R. 79: 5, 7). He also felt that the illuminated engine violated Salt Lake City ordinance 12-28-090, which forbids people to add any lights to their vehicles (R. 79:

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[1]Either the transcript is in error or the officer was; the correct ordinance is 12-28-100.

7). The two motorcycles drove by again later, and the quieter one of the two drove close enough to Officer Martinez that Officer Kendrick decided to stop both motorcycles (R. 79: 5). Kendrick not know the make of Beller's louder motorcycle with the illuminated engine and conceded that he did not know if Kendrick's motorcycle was as it had been originally manufactured, or if it had been altered (R. 79: 9, 12-13).

Judge Medley found that the officer had no reasonable suspicion to justify the stop of Beller's motorcycle, because the officer's testimony failed to establish a violation of any law (R. 64-66). However, Judge Medley refused to grant relief from the Division's revocation of Beller's license because he ruled that the exclusionary rule has no application to the driver license revocation proceedings, which are civil (R. 66-69).

SUMMARY OF ARGUMENTS

Judge Medley correctly ruled that the officer violated Beller's Fourth Amendment rights when he stopped Beller's motorcycle without reasonable suspicion of any offense.

The Division did not raise its claim before the administrative hearing officer that the exclusionary rule has no application to driver license revocation hearings. Because the Division waived this claim, Judge Medley should not have addressed it.

Judge Medley erred in holding that the exclusionary rules have no application to the Division's revocation proceedings. Review of Utah law and persuasive authorities from other jurisdictions confirms the propriety of excluding the fruits of the violations of

Beller's Fourth Amendment and Article I § 14 rights in such proceedings.

This Court should reverse the lower court's ruling and the Division's revocation of Beller's license.

ARGUMENTS

I. JUDGE MEDLEY'S FINDINGS THAT OFFICER KENDRICK'S TESTIMONY FAILED TO ESTABLISH A REASONABLE SUSPICION TO JUSTIFY THE TRAFFIC STOP ARE NOT CLEARLY ERRONEOUS.

The Fourth Amendment of the United States Constitution was created to protect individuals from unreasonable searches and seizures. U.S. Const. Amend. IV. "The United States Supreme Court held that 'stopping an automobile and detaining its occupants constitute[s] a seizure within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention is quite brief.'" State v. Matinson, 875 P.2d 584, 586 (Utah App. 1994). In order for a traffic stop to be reasonable under the Fourth Amendment, the police officer's action must be justified at its inception and the resulting detention must be reasonably related in scope to the circumstances that justified the interference in the first place. E.g., id. Specific situations in which police officers are justified in making stops of vehicles include the following:

> When the officer observes the driver commit a traffic violation;
> When the officer has reasonable articulable suspicion that the driver is committing a traffic offense, such as driving under the influence of alcohol or driving without a license; and
> When the officer has a reasonable articulable suspicion that the driver is

engaged in more serious criminal activity, such as transporting drugs. Provo City v. Warden, 844 P.2d 360, 362 (Utah App. 1992).

Regarding the first justification, the traffic violation must be committed in the officer's presence. State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994). Consequently, if the officer did not observe the underlying offense, then "the stop [is] not justified at its inception and the evidence derived from it must be suppressed." Id. at 1134. Regarding the second and third justifications, unlike the first, an officer is justified in stopping a vehicle when he has a reasonable articulable suspicion that the driver is committing a more serious traffic offense, such as driving under the influence of alcohol or driving without a license, or, that the driver is engaged in more serious criminal activity, such as transporting drugs. Matinson, 875 P.2d at 586-87 (emphasis added).

Judge Medley was well within his discretion and committed no clear error[2] in finding that Kendrick's testimony failed to establish a reasonable suspicion of a violation of the city's muffler ordinance, because Kendrick had no means of measuring the level of noise Beller's muffler was emitting, and because he had articulated no means of assessing whether the muffler was emitting a level of noise that proved that the muffler had been altered, in order to establish a violation of Salt Lake City Ordinance 12.28.100 (R. 65).[3]

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[2]The trial court's findings of fact are entitled to substantial deference and will be reversed only for clear error, whereas application of the law to the facts is subject to the *de novo* standard of review. E.g., Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah App. 1996).

[3]That ordinance provides,

Further, Judge Medley committed no error, see Smoot, *supra*, in finding that Kendrick's testimony regarding the illumination of Beller's motorcyle's engine failed to establish a lawful basis for the traffic stop. The city ordinance upon which Kendrick relied, Salt Lake City Ordinance 12.28.090, does not address whether people may alter the lights of their vehicles.[4] While subsection (a)(4) of that ordinance incorporates state

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> Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation. Notwithstanding the foregoing, no person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase or change the character of the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle. No person shall sell, furnish, provide or purchase, nor shall any person attach to any vehicle any device which will or is intended to increase or change the character of the sound of the original muffling equipment on any motor vehicle. No person shall operate a motor vehicle with an exhaust system so modified.

[4]12.28.090 provides:

A. No person shall drive, move, stop or park, nor shall the owner or person in possession cause or knowingly permit to be driven, moved, stopped or parked on any street or alley, any vehicle:

> 1. Which is in such unsafe condition as to endanger any person or property;
> 2. Which is not equipped with those serviceable lamps, reflectors, brakes, horn and other warning and signaling devices, windows, windshields, windshield wipers, mirrors, mufflers, fenders, tires, and other parts and equipment in the position, condition and adjustment meeting the requirements of the laws of the state as to such parts and equipment;
> 3. Which, when upon a street or highway, is operating more than four (4) headlamps, auxiliary lamps and/or spot lamps on the front of such vehicle, each projecting a beam of an intensity greater than three hundred (300) candlepower at any one time;
> 4. Which is of such size, weight or condition, or is loaded or equipped in such manner as is in violation of the laws of the state with respect to such vehicle.

B. No person shall do any act forbidden or fail to perform any act required by the laws of the state relating to tires, lamps, brakes, fenders, horns, sirens, whistles, bells and other parts and equipment, and size, weight and load of any vehicle; provided, however, an

equipment laws, see id., Judge Medley correctly found that Officer Kendrick's testimony failed to establish a violation of the statute pertaining to lighting equipment, because Kendrick's testimony did not indicate that the illumination of the engine could be seen from the front of Beller's motorcycle, as would have been essential to establish a violation of the relevant equipment statute, Utah Code Ann. § 41-6a-1616(2)(b) (R. 64-65).[5]

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authorized emergency vehicle may be equipped with and may display flashing lights which do not indicate a right or left turn.

C. Any motorcycle or motor driven vehicle carrying a passenger on a public highway, other than in a sidecar or enclosed cab shall be equipped with footrests for such passenger.

D. No person shall operate any motorcycle or motor driven cycle with handlebars above shoulder height.

E. No person under eighteen (18) years of age shall operate or ride upon a motorcycle or motor driven cycle upon a public highway unless such person is wearing protective headgear which complies with standards established by the state commissioner of public safety. This subsection shall not apply to persons riding within a closed cab. (Ord. 62-02 § 16, 2002: prior code title 46, art. 9 § 174).

[5]Utah Code Ann. § 41-6a-1616 provides:

(1)(a) Except as provided under Subsection (1)(b), under the conditions specified under Subsection 41-6a-1603(1)(a), a lighted lamp or illuminating device on a vehicle, which projects a beam of light of an intensity greater than 300 candlepower shall be directed so that no part of the high intensity portion of the beam will strike the level of the roadway on which the vehicle stands at a distance of more than 75 feet from the vehicle.

(b) The provisions of Subsection (1)(a) do not apply to head lamps, spot lamps, auxiliary lamps, flashing turn signals, hazard warning lamps, and school bus warning lamps.

(c) A motor vehicle on a highway may not have more than a total of four lamps lighted on the front of the vehicle including head lamps, auxiliary lamps, spot lamps, or any other lamp if the lamp projects a beam of an intensity greater than 300 candlepower.

(2)(a) Except for an authorized emergency vehicle and a school bus, a person may not operate or move any vehicle or equipment on a highway with a lamp or device capable of displaying a red light that is visible from directly in front of the center of the vehicle.

Because Kendrick had no reasonable suspicion that Beller had violated the law when he stopped his motorcycle, the stop violated the Fourth Amendment, and all fruits of that stop are subject to suppression. See Matinson and Lopez, *supra*.

The stop of Beller's motorcycle likewise violated Article I § 14 of the Utah Constitution, which provides protection which is at least co-extensive with the federal counterpart, in forbidding "sweeping, dragnet-type detentions of ordinary people engaged in peaceful, ordinary activities. Under both constitutions, the general rule is that "specific and articulable facts ··· taken together with rational inferences from those facts, [must] reasonably warrant" the particular intrusion." State v. DeBooy, 996 P.2d 546, 549 (Utah 2000). See also id. 996 P.2d at 552 (recognizing that Article I § 14 and numerous provisions of the Utah Declaration of Rights, consistent with the history of the founders of this State, are concerned with "all purpose criminal investigation without individualized suspicion.").

(b) Except for a law enforcement vehicle, a person may not operate or move any vehicle or equipment on a highway with a lamp or device capable of displaying a blue light that is visible from directly in front of the center of the vehicle.

(3) A person may not use flashing lights on a vehicle except for:

(a) taillights of bicycles under Section 41-6a-1114;

(b) authorized emergency vehicles under rules made by the department under Section 41-6a-1601;

(c) turn signals under Section 41-6a-1604;

(d) hazard warning lights under Sections 41-6a-1608 and 41-6a-1611;

(e) school bus flashing lights under Section 41-6a-1302; and

(f) vehicles engaged in highway construction or maintenance under Section 41-6a-1617.

(4) A person may not use a rotating light on any vehicle other than an authorized emergency vehicle.

II. JUDGE MEDLEY ERRED IN DENYING BELLER RELIEF FROM THE DIVISION'S REVOCATION OF HIS LICENSE.

A. THE DIVISION WAIVED ITS CLAIM THAT BELLER WAS ENTITLED TO NO REMEDY FOR THE VIOLATION OF HIS FOURTH AMENDMENT RIGHTS.

As argued in the trial court, the only issue addressed during the administrative hearing was the constitutionality of the stop – an issue that frequently results in the Division's taking no action in cases wherein the constitutions are violated (R. 53-55). The Division never argued before the administrative hearing officer that Beller was entitled to no remedy for Officer Kendrick's violation of his Fourth Amendment rights, or that the exclusionary rule did not apply (R. 53-55).

Because the Division failed to bring this issue to the hearing officer's attention, it was improper for the trial court to permit the Division to raise the claim in seeking judicial review. See, e.g., Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998) (in administrative context, a party must "bring an issue to the fact finder's attention to that there is at least the possibility that it could be considered."). This preservation requirement applies both to factual issues, id., and to legal issues, e.g., US Xpress, Inc. v. Utah State Tax Com'n, 886 P.2d 1115 (Utah App. 1994).

Because the Division waived its claim that Beller is entitled to no remedy for the violation of his Fourth Amendment rights before the hearing officer, this Court should reverse the trial court's ruling denying Beller relief and order the revocation of Beller's license reversed as well. See id.

B. THE EXCLUSIONARY RULE OF ARTICLE I § 14 APPLIES.

Despite finding that Officer Kendrick violated the Fourth Amendment, Judge Medley denied Beller relief from the Division's revocation of his license, reasoning that under the Fourth Amendment to the United States Constitution and Article I § 14 of the Utah Constitution, the exclusionary rule does not apply to civil cases, but only applies in criminal and quasi-criminal cases (R. 66-67). The court reasoned that because Utah cases characterize driver's license hearings as civil, the exclusionary rules have no application to the proceedings (R. 67-69).

Assuming *arguendo* that the trial court was correct that driver revocation proceedings have been characterized as civil by our courts, see, e.g., Holman v. Cox, 598 P.2d 1331, 1333 (Utah 1979); Ballard v. State, 595P.2d 1302, 1304 (Utah 1978), the trial court was incorrect in ruling that a civil characterization of a suit forecloses application of the exclusionary rule under Article I § 14.

The Utah Supreme Court has held that exclusion of evidence is a necessary consequence of the violation of Article I § 14. See State v. Larocco, 794 P.2d 460, 471-73 (Utah 1990) (*plurality*) (recognizing privacy interest in interior of car and adopting exclusionary rule as a necessary consequence of Article I § 14 and noting that there are no recognized exceptions to this exclusionary rule); State v. Thompson, 810 P.2d 415, 416-20 (Utah 1991) (majority of the Court recognized privacy interest in bank recorder ds un Article I § 14, held in accordance with Larocco that exclusion is a necessary consequence

of a violation of Article I § 14, and that no exceptions had been recognized to the Utah exclusionary rule); State v. DeBooy, 996 P.2d 546, 554 (Utah 2000) (finding exclusion of illegal checkpoint stop to be a necessary consequence of Article I § 14). This Court has applied the mandatory exclusionary rule of Article I § 14 for Fourth Amendment violations as well. See State v. Ziegelman, 905 P.2d 883, 887 (Utah 1995) (finding that violation of Fourth Amendment during traffic stop required suppression under Larocco).

In Sims v. Collection Div. of Utah State Tax Div., 841 P.2d 6 (Utah 1992)(*plurality*), the main opinion reviewed other state court interpretations of their state exclusionary rules, and then concluded that under Article I § 14, exclusion would apply in cases wherein civil proceedings are criminal in effect and wherein it is necessary to deter further illegal searches. Id. at 11-13. The opinion indicated that a law would be viewed as criminal in effect or quasi-criminal, or as encompassing the application of the exclusionary rule, when "the aims and objectives of a civil penalty are closely aligned with those of the criminal law" and when enforcement of the law is "inextricably intertwined with proof of criminal activity." Id. at 13-14. In discussing the latter circumstance, the Sims opinion expressly relied on a state case holding that a state exclusionary rule would apply to a driver license revocation hearing, like the instant one. The Sims opinion states,

> The quasi-criminal nature of the tax proceeding in this case is further evidenced by the fact that enforcement of the Act is inextricably connected with proof of criminal activity. See Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 289 (N.D.1987) ("[T]he civil and criminal consequences [of a

> refusal to take an intoxilyzer test] are so intermingled that they are not perceptibly different to a lay person."). Violation of the Act necessarily involves criminal conduct and a violation of criminal law. Compliance with the Act presupposes the possessor's knowledge of the possession of illegal drugs and therefore requires a violation of criminal law. "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the [civil] proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." Given that an essential element of a criminal offense must be established by either violation of or compliance with the Act, we are convinced that enforcement proceedings under the Act must be viewed as quasi-criminal and the exclusionary rule should therefore apply.

Sims at 14 (citation omitted). Justice Stewart concurred in the result in Sims, albeit under federal constitutional law recognizing that the exclusionary rule applies in quasi-criminal proceedings. Sims, 841 P.2d at 15.

As the courts recognized in Kuntz and Sims, "'the civil and criminal consequences of a refusal to take an intoxilyzer test are so intermingled that they are not perceptibly different to a lay person.'" Sims at 14, quoting Kuntz, 405 N.W.2d at 289. In driver license revocation hearings, the government is required to establish whether the arresting officer had reasonable grounds to believe the driver was driving under the influence of drugs or alcohol to an unlawful extent, whether the person refused to submit to a test, and what the test results were, if any. See, e.g., Utah Code Ann. §§ 41-6a-521(3), 53-3-223 (6)(c). Similarly, in the course of DUI prosecutions, evidence is routinely presented regarding whether an officer had reasonable suspicion or probable cause to stop a driver or conduct a breath test, whether the person refused or submitted to a test, and what the

test results were. See, e.g., Layton City v. Noon, 736 P.2d 1035 (Utah App. 1987) (addressing whether officer had probable cause to arrest for DUI and affirming admission of evidence of refusal to submit to chemical test). Just as revocation of one's license is a consequence of an administrative revocation hearing, courts routinely order revocation of driver licenses as part of a sentence in criminal DUI prosecutions. See, e.g., Utah Code Ann. § 53-3-220 (division must revoke license upon receiving proof of DUI conviction).

Because of the inextricable intertwining of civil and criminal elements of proof and consequences, the exclusionary rules of Article I § 14 and the Fourth Amendment should apply in driver license revocation proceedings. See, Sims and Kuntz, *supra*.

Additionally, because both the civil and criminal proceedings hinge on the same investigative conduct by the police, the need to deter violations of the Fourth Amendment and Article I § 14 is equally compelling in both contexts, and confirms that the exclusionary rule should apply here. See Sims, *supra*, 841 P.2d at 11-13.

Reference to decisions from other states confirms the propriety of applying the exclusionary rule in Utah driver license hearings. In State v. Lussier, 757 A.2d 1017 (Ver. 2000), in addressing the license revocation statute in Vermont, the Vermont Supreme Court held that reasonable ground to suspect a DUI violation is "logically extended to the question of whether there was a reasonable basis for the stop." Id. at 1020. The court reasoned that a "constitutional stop is a necessary predicate for a finding that an officer had 'reasonable grounds' to believe a person was driving while

intoxicated[,]" and noted that the legislature's provision of a hearing to protect the statutory right to reasonable cause to justify a breath test logically required inquiry into and protection of the constitutional right to be free from unlawful searches and seizures. Id. at 1023. Despite the fact that the administrative licensing hearings were civil and designed, like Utah's, to protect the public by swiftly removing DUI offenders from the roadways, Utah Code Ann. § 53-3-222, the Lussier court held under the Vermont Constitution that the legislature nonetheless did not intend for revocations to be premised on unconstitutional traffic stops. Id. at 1020-22.

Similarly here, where the Utah Legislature contemplates administrative hearings inquiring into whether officers requiring chemical tests had reasonable grounds to suspect the driving was under the influence, Utah Code Ann. §§ § 41-6a-521(3), 53-3-223 (6)(c), the Legislature likewise permits inquiry into the constitutional underpinnings of the stop which preceded the tests. Cf Lussier, *supra.* The Legislature's requirement of administrative inquiry into whether an officer had "reasonable grounds" to believe someone was driving under the influence prior to seeking a chemical test is fairly read as permitting inquiry into Fourth Amendment issues, for the Utah Legislature routinely uses the phrase "reasonable cause" in statutes interpreted by the courts as requiring proof of probable cause. See, e.g., Utah Code Ann. §§ 77-7-2 (requiring reasonable cause for warrantless arrests), 77-7-14 (requiring reasonable cause for arrests by private citizens) and State v. Bills, 2005 UT App 99, 2005 WL 487722 at *1 (using "reasonable cause"

and "probable cause" interchangeably). Cf. Lussier, *supra*.

Numerous other state courts have extended the exclusionary rule to driver license proceedings. See Watford v. Ohio Bur. of Motor Vehicles, 674 N.E.2d 776 (Ohio App. 8th Dist. 1996) (holding a constitutional stop is required in analyzing a license suspension); People v. Krueger, 567 N.E.2d 717 (Ill. App. 2d Dist. 1991) (statute implicitly requires the arrests triggering license suspension to be lawful); Pooler v. Motor Vehicles Div., 755 P.2d 701 (Ore. 1988) (permitting defendants to argue validity of stop in driver license proceedings); Brownsberger v. Department of Transp. Motor Vehicle Div., 460 N.W.2d 449 (Iowa 1990) (license revocation proceeding may be re-opened to address unlawful stop).

Courts outside of Utah have held that the exclusionary rule has no application to driver license revocation proceedings. See, e.g., Riches v. Director of Revenue, 987 S.W.2d 331, 334 (Mo. 1999). These courts justify their holdings with three main reasons: driver license revocation proceedings would be unduly complicated if the exclusionary rule applied; drunken drivers should be removed from public roadways; and since the exclusionary rule applies to parallel criminal D.U.I. prosecutions, there would be minimal deterrent benefit from applying the exclusionary rule in the civil proceedings as well. See, e.g., Lussier, 757 A.2d at 1025 (discussing Riches as an example of such cases).

As the Lussier court recognized, there is no empirical evidence or sound argument to make in support of the notion that application of the exclusionary rule would unduly

complicate or extend the revocation proceedings. Lussier, 757 A.2d at 1025. By statute, hearing officers in this state routinely inquire into the "reasonable grounds" or probable cause to believe that those requested to submit to chemical tests were driving under the influence. See, Utah Code Ann. §§ § 41-6a-521(3), 53-3-223 (6)(c). Particularly where the driver license revocation hearing officers have historically and routinely permitted inquiry into the bases for traffic stops, as occurred in this case, and have refrained from revoking licenses in cases involving Fourth Amendment violations (R. 53-55), it is clear that application of the exclusionary rule in revocation proceedings is workable and expedient in Utah.

Additionally, according to the Lussier, there is no empirical evidence that applying the exclusionary rule would detract significantly from efforts to remove drunken drivers from the roads. Lussier, 757 A.2d at 1026. Further, courts must jealously guard drivers' constitutional rights to privacy and to be let alone, and cannot permit officers to interfere with drivers without cause, or to obtain driver licenses while disregarding the constitutions. See id.

Applying the exclusionary rule in revocation proceedings is every bit as important as it is in the context of criminal prosecutions, in light of the facts that both proceedings involve the same evidence presented through the same officers, and that revocation of licenses is "often the most long-lasting and significant sanction imposed on the defendants." Lussier, 757 A.2d 1026, citing, Whisenhunt v. Department of Public Safety,

746 P.2d 1298, 1299 (Alaska 1987). As the Lussier court candidly recognized,

> The nationwide campaign against drunk driving has taught us, if nothing else, that the threat of criminal prosecution has little impact on keeping problem drinkers off of our highways. As a result, the focus of state legislatures and law enforcement agencies has been on removing intoxicated motorists from highways by suspending their licenses or otherwise preventing them from driving. Because the primary objective of DUI laws and law enforcement is to remove intoxicated drivers from our highways, the deterrent effect of the exclusionary rule would be weakened significantly if it were not applied in civil suspension proceedings.

Lussier, 757 A.2d at 1026, citing Whisenhunt, 746 P.2d at 1299.

If Utah departed from the standard practice of applying the exclusionary rule in revocation proceedings (R. 53-55), police might be encouraged to make constitutionally baseless stops premised on "hunches, or stereotypical beliefs, or for any or no reason whatsoever, knowing that even if any evidence obtained from the stop were to be suppressed in criminal proceedings, license suspensions could still follow." Lussier, 757 A.2d at 1026. These considerations weigh in favor of continuing to apply the exclusionary rule in revocation proceedings in cases wherein the police violate the Fourth Amendment and/or Article I § 14. See Lussier at 1026, citing 1 W. LaFave, Search and Seizure, § 1.7(e), at 202-03 (3d ed.1996) (discussing factors relevant to applicability of exclusionary rule), and One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700-02 (1965) (relying on similar factors in applying exclusionary rule to forfeiture proceedings.

Because of the intertwined nature of the civil and criminal proceedings pertaining to driver license revocations related to DUIs and chemical tests, because of the equally

compelling value of deterring unconstitutional police behavior in traffic stops in both contexts, and because the Legislature requires at least some inquiry into Fourth Amendment justifications and does not limit this inquiry, this Court should hold that the exclusionary rule continues to apply to driver license revocation proceedings. See, e.g., Sims and Lussier, *supra*.

CONCLUSION

This Court should reverse the trial court's ruling that the exclusionary rule does not apply to driver license revocation proceedings, and order the administrative revocation of Beller's license reversed.

Respectfully submitted this 16 day of October, 2006.

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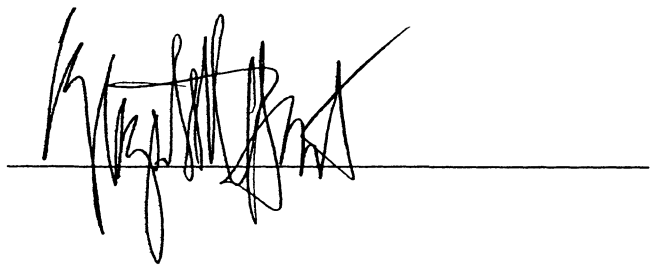
By: _____
RONALD J. YENGICH

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, first class postage pre-paid, to Assistant Attorney General Annina M. Mitchell, 160 East 300 South, 5th Floor, P.O. Box 140858, Salt Lake City, Utah 84114-0858, this 16 day of October, 2006.



ADDENDUM

TRIAL COURT'S MEMORANDUM DECISION

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CURTIS J. BELLER	:	
Petitioner,	:	MEMORANDUM DECISION
vs.	:	CASE NO. 050913807
NANETTE ROLFE, Director, Utah State Driver License Division	:	
Respondent.	:	

Before the Court is petitioner's Petition seeking review of the suspension of his drivers license and driver privileges. Petitioner appeared and was represented by Ronald J. Yengich. Respondent appeared through Rebecca D. Waldron, Assistant Attorney General. The Court having heard and considered the evidence, stipulations of the parties and arguments, being fully advised in the premises, enters this Memorandum Decision.

BACKGROUND

In the early morning hours of July 1, 2005, petitioner and a companion passed by Officer Kendrick ("Kendrick") on separate motorcycles traveling on the opposite side from where Kendrick was stationed. Kendrick later stated that he thought that the motorcycles sounded unusually loud. When petitioner passed for the second time, this time on the near side of the street, Kendrick pulled petitioner over. Kendrick also noticed that the engine of the motorcycle was lighted.

Kendrick later testified that he believed that petitioner had violated two separate ordinances. First, he believed that petitioner was operating a vehicle in violation of either a Salt Lake City or State ordinance governing the type of lighting a vehicle may have; and second, because he believed that petitioner was operating his motorcycle in violation of Salt Lake City Ordinance § 12.28.100, which prohibits modification of an exhaust system of a motor vehicle in such a manner as will amplify, increase, or change the character of the noise emitted by a motor of such vehicle above that emitted by the muffler originally installed on the vehicle.

Upon approaching and questioning petitioner, Officer Kendrick observed that petitioner appeared intoxicated. The field sobriety tests and intoxilyzer results confirmed this observation. Petitioner was arrested for operating his motorcycle under the influence of alcohol.

An administrative hearing to determine whether petitioner's license should be suspended followed on July 28, 2005. As a matter of routine, the hearing officer apparently inquired into whether the stop was legal, but ultimately decided to suspend petitioner's license based upon the evidence obtained at the scene and thereafter.

Petitioner appealed the decision in the present action, asserting that the suspension was arbitrary, capricious and without due process of law.

It should be noted initially, both counsel stipulated to the facts and corresponding conclusions of law as described in respondent's proposed Findings of Fact and Conclusions of Law, beginning after the initial stop of petitioner. The parties' stipulation is incorporated herein by this reference.

ANALYSIS

Legality of the Stop

Petitioner maintains that Officer Kendrick violated petitioner's Fourth Amendment rights of the United States Constitution because the traffic stop was not justified at its inception, and Officer Kendrick lacked reasonable suspicion that petitioner was violating the law. State v. Lopez, 873 P.2d 1127 (Utah 1994), Provo City v. Warden, 844 P.2d 360 (Utah App. 1992).

In the instant case, the Court finds from a totality of the circumstances that Officer Kendrick lacked reasonable suspicion that petitioner was violating the law. Officer Kendrick testified he stopped petitioners' motorcycle because the sound of the muffler was extremely loud and that the engine was illuminated by blue lights. Officer Kendrick's detention of petitioner would not have been justified by the lights which illuminated the engine, based upon his failure to articulate whether the lights could be seen from in front of the motorcycle or whether the lights were located on the side of the motorcycle, which would not constitute a violation of the law. Officer Kendrick's

testimony regarding the engine illumination is unclear and cannot alone support a reasonable suspicion that petitioner committed a traffic or equipment violation.

Officer Kendrick further testified that petitioner's motorcycle muffler was extremely loud and was suspected to be modified. Officer Kendrick based his suspicion upon his experience with motorcycles, yet other than riding a Harley Davidson Road King, the record is noticeably lacking any specificity describing Officer Kendrick's experience, such as how many years he owned and operated motorcycles? How is Officer Kendrick familiar with the sound of original and modified motorcycles? Officer Kendrick testified that at the inception of the stop, he could not identify the make or model of petitioner's motorcycle, nor its factory specifications. Other than Officer Kendrick's experience, which was not detailed, he had no other objective means of determining the decibels of petitioner's motorcycle. Officer Kendrick could not with any degree of reliability form a reasonable suspicion that petitioner's muffler had been unlawfully modified. Finally, Officer Kendrick testified he believed petitioner's motorcycle was custom made, that he did not know the bike's specifications, nor what kind of muffler was originally installed, therefore, Officer Kendrick could not form a reasonable suspicion the petitioner violated Salt Lake City Code § 12:28.100.

Applicability of the Exclusionary Rule

The crux of petitioner's contention is that the initial stop was not based upon reasonable articulable suspicion, and was therefore illegal. Accordingly, the argument follows, the evidence was obtained following the stop pursuant to an unreasonable search and seizure, in violation of the 4th and 14th amendments to the United States Constitution. By operation of the exclusionary rule, the suspension of driving privileges which flowed from that stop must be reversed. The issue which this argument presents to the Court is whether the exclusionary rule applies to DLD hearings—which are civil in nature, but often result—as was the case here—in the deprivation of rights or privileges. In a sense, as further analyzed below, the question really is whether the DLD hearings are civil, or quasi-criminal in nature. As applied to driver license revocation or suspension hearings, this is a matter of first impression in this state, and the parties concede that nationally, authorities are split.[1]

Despite the novelty of this precise issue, both of Utah's appellate courts have consistently held that the exclusionary rule does not apply in civil cases. See In re: A.R. and C.P., 1999 UT 43, 982 P.2d 73

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[1]While there is a split on this particular issue, at least one writer believes that there is a majority view: "a majority of states do not apply the exclusionary rule in administrative license hearings." See Michelle L. Hornish, Note, Excluding the Exclusionary Rule, 65 Mo. L. Rev. 533, 542 (2000).

(holding the exclusionary rule inapplicable to civil child protection proceedings); State of Utah v. Jarman, 1999 UT App. 269, 987 P.2d 1284 (probation revocation proceedings).

However, it is equally clear that, at least under the protection of the Utah State Constitution, the exclusionary rule applies to quasi-criminal proceedings. See, Simms v. Utah State Tax Comm'n 841 P.2d 6 (Utah 1992) (reasoning that illegally obtained evidence should be excluded from a civil proceeding if the proceeding is in effect criminal or if the exclusion is necessary to deter future unconstitutional searches).[2]

While petitioner contends that the revocation or suspension of his driver's licence was a criminal sanction, he fails to support this contention with relevant Utah case law. Instead, he turns to cases from other jurisdictions which hold that a legal search and seizure is a necessary predicate to introduction of challenged evidence in a driver's licence suspension proceeding. This ignores Utah's clear stance that

> "while we agree . . . that the right to drive is a valuable right or privilege and it cannot be taken away without procedural due process, we do not agree that revocation proceedings are therefore necessarily criminal or quasi-criminal in nature."

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[2]Simms was a 2-1-2 plurality opinion, however, the one justice concurring in the result agreed with the plurality's opinion that the tax penalty at issue in that case was in effect criminal.

Ballard v. State, 595 P.2d 1302, 1304 (Utah 1979). See also, Holman v. Cox, 598 P.2d 1331 ("This Court has made clear that license revocation proceedings, as such, are civil in nature and that constitutional rights afforded defendants in a criminal proceeding do not extend to those proceedings").

These cases are equally clear that the administrative consequences which flow from driving under the influence of alcohol are remedial, and not punitive in nature:

> The purpose of this administrative procedure is not to punish the inebriated drivers; such persons are subject to separate criminal prosecution for the purpose of punishment. The administrative revocation proceedings are to protect the public, not to punish individual drivers.

Ballard, at 1305. Indeed, as the legislature states in its purpose for enacting the restriction:

> The Legislature finds that the purpose of this title relating to suspension or revocation of a person's license or privilege to drive a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol . . . is protecting persons on highways by quickly removing from the highways those persons who have shown they are safety hazards

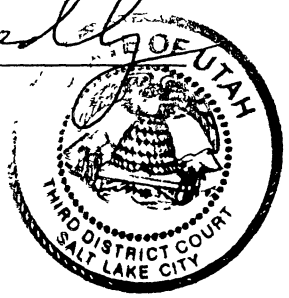
Utah Code Ann. § 53-3-222 (2006).

Based upon the clear weight of authority, because the Courts of this state uniformly consider a drivers' license revocation proceeding to be a civil action and not a quasi-criminal action, the exclusionary rule does not apply. Therefore, based upon the parties' stipulation

referenced hereinbefore and respondent's consideration of the evidence obtained at the scene in reaching her decision to suspend petitioner's license was not arbitrary and capricious. Accordingly, petitioner's claim is hereby dismissed and the previously ordered stay of suspension of petitioner's license is hereby lifted. This constitutes the final Order of the Court on the matters referenced herein. No further Order is required.

Dated this 7 day of June, 2006.

TYRONE E. MEDLEY
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 7 day of June, 2006:

Ronald J. Yengich
Attorney for Petitioner
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J. Ashley

GOVERNING CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Salt Lake City Ordinance 12.28.090

12.28.090 Lights, Brakes, And Other Equipment:
A. No person shall drive, move, stop or park, nor shall the owner or person in possession cause or knowingly permit to be driven, moved, stopped or parked on any street or alley, any vehicle:
1. Which is in such unsafe condition as to endanger any person or property;

2. Which is not equipped with those serviceable lamps, reflectors, brakes, horn and other warning and signaling devices, windows, windshields, windshield wipers, mirrors, mufflers, fenders, tires, and other parts and equipment in the position, condition and adjustment meeting the requirements of the laws of the state as to such parts and equipment;

3. Which, when upon a street or highway, is operating more than four (4) headlamps, auxiliary lamps and/or spot lamps on the front of such vehicle, each projecting a beam of an intensity greater than three hundred (300) candlepower at any one time;

4. Which is of such size, weight or condition, or is loaded or equipped in such manner as is in violation of the laws of the state with respect to such vehicle.

B. No person shall do any act forbidden or fail to perform any act required by the laws of the state relating to tires, lamps, brakes, fenders, horns, sirens, whistles, bells and other parts and equipment, and size, weight and load of any vehicle; provided, however, an authorized emergency vehicle may be equipped with and may display flashing lights which do not indicate a right or left turn.

C. Any motorcycle or motor driven vehicle carrying a passenger on a public highway, other than in a sidecar or enclosed cab shall be equipped with footrests for such passenger.

D. No person shall operate any motorcycle or motor driven cycle with handlebars above shoulder height.

E. No person under eighteen (18) years of age shall operate or ride upon a motorcycle or motor driven cycle upon a public highway unless such person is wearing protective headgear which complies with standards established by the state commissioner of public safety. This subsection shall not apply to persons riding within a closed cab. (Ord. 62-02 § 16, 2002: prior code title 46, art. 9 § 174)

Salt Lake City Ordinance 12.28.100

Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation. Notwithstanding the foregoing, no person shall modify the exhaust system of a motor vehicle in a manner which will amplify or increase or change the character of the noise emitted by the motor of such vehicle above that emitted by the muffler originally installed on the vehicle. No person shall sell, furnish, provide or purchase, nor shall any person attach to any vehicle any device which will or is intended to increase or change the character of the sound of the original muffling equipment on any motor vehicle. No person shall operate a motor vehicle with an exhaust system so modified.

Utah Code Ann. § 41-6a-521

(1)(a) A person who has been notified of the Driver License Division's intention to revoke the person's license under Section 41-6a-520 is entitled to a hearing.

(b) A request for the hearing shall be made in writing within ten calendar days after the day on which notice is provided.

(c) Upon request in a manner specified by the Driver License Division, the Driver License Division shall grant to the person an opportunity to be heard within 29 days after the date of arrest.

(d) If the person does not make a request for a hearing before the Driver License Division under this Subsection (1), the person's privilege to operate a motor vehicle in the state is revoked beginning on the 30th day after the date of arrest for a period of:

(i) 18 months unless Subsection (1)(d)(ii) applies; or

(ii) 24 months if the person has had a previous:

(A) license sanction for an offense that occurred within the previous ten years from the date of arrest under Section 41-6a-517, 41-6a-520, 41-6a-530, 53-3-223, 53-3-231, or 53-3-232; or

(B) conviction for an offense that occurred within the previous ten years from the date of arrest under Section 41-6a-502 or a statute previously in effect in this state that would constitute a violation of Section 41-6a-502.

(2)(a) Except as provided in Subsection (2)(b), if a hearing is requested by the person, the hearing shall be conducted by the Driver License Division in the county in which the

offense occurred.

(b) The Driver License Division may hold a hearing in some other county if the Driver License Division and the person both agree.

(3) The hearing shall be documented and shall cover the issues of:

(a) whether a peace officer had reasonable grounds to believe that a person was operating a motor vehicle in violation of Section 41-6a-502, 41-6a-517, 41-6a-530, 53-3-231, or 53-3-232; and

(b) whether the person refused to submit to the test or tests under Section 41-6a-520.

(4)(a) In connection with the hearing, the division or its authorized agent:

(i) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; and

(ii) shall issue subpoenas for the attendance of necessary peace officers.

(b) The Driver License Division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 78- 46-28.

(5)(a) If after a hearing, the Driver License Division determines that the person was requested to submit to a chemical test or tests and refused to submit to the test or tests, or if the person fails to appear before the Driver License Division as required in the notice, the Driver License Division shall revoke the person's license or permit to operate a motor vehicle in Utah beginning on the date the hearing is held for a period of:

(i) 18 months unless Subsection (5)(a)(ii) applies; or

(ii) 24 months if the person has had a previous:

(A) license sanction for an offense that occurred within the previous ten years from the date of arrest under Section 41-6a-517, 41-6a-520, 41-6a-530, 53-3-223, 53-3-231, or 53-3-232; or

(B) conviction for an offense that occurred within the previous ten years from the date of arrest under Section 41-6a-502 or a statute previously in effect in this state that would constitute a violation of Section 41-6a-502.

(b) The Driver License Division shall also assess against the person, in addition to any fee

imposed under Subsection 53-3-205(13), a fee under Section 53-3-105, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs.

(c) The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under Subsection (2) that the revocation was improper.

(6)(a) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.

(b) Judicial review of an informal adjudicative proceeding is a trial.

(c) Venue is in the district court in the county in which the offense occurred.

Utah Code Ann. § 41-6a-1616

(1)(a) Except as provided under Subsection (1)(b), under the conditions specified under Subsection 41-6a-1603(1)(a), a lighted lamp or illuminating device on a vehicle, which projects a beam of light of an intensity greater than 300 candlepower shall be directed so that no part of the high intensity portion of the beam will strike the level of the roadway on which the vehicle stands at a distance of more than 75 feet from the vehicle.

(b) The provisions of Subsection (1)(a) do not apply to head lamps, spot lamps, auxiliary lamps, flashing turn signals, hazard warning lamps, and school bus warning lamps.

(c) A motor vehicle on a highway may not have more than a total of four lamps lighted on the front of the vehicle including head lamps, auxiliary lamps, spot lamps, or any other lamp if the lamp projects a beam of an intensity greater than 300 candlepower.

(2)(a) Except for an authorized emergency vehicle and a school bus, a person may not operate or move any vehicle or equipment on a highway with a lamp or device capable of displaying a red light that is visible from directly in front of the center of the vehicle.

(b) Except for a law enforcement vehicle, a person may not operate or move any vehicle or equipment on a highway with a lamp or device capable of displaying a blue light that is visible from directly in front of the center of the vehicle.

(3) A person may not use flashing lights on a vehicle except for:

(a) taillights of bicycles under Section 41-6a-1114;

(b) authorized emergency vehicles under rules made by the department under Section 41-6a-1601;

(c) turn signals under Section 41-6a-1604;

(d) hazard warning lights under Sections 41-6a-1608 and 41-6a-1611;

(e) school bus flashing lights under Section 41-6a-1302; and

(f) vehicles engaged in highway construction or maintenance under Section 41-6a-1617.

(4) A person may not use a rotating light on any vehicle other than an authorized emergency vehicle.

Utah Code Ann. § 53-3-220

(1)(a) The division shall immediately revoke or, when this chapter or Title 41, Chapter 6a, Traffic Code, specifically provides for denial, suspension, or disqualification, the division shall deny, suspend, or disqualify the license of a person upon receiving a record of the person's conviction for any of the following offenses:

(i) manslaughter or negligent homicide resulting from driving a motor vehicle, or automobile homicide under Section 76-5-207;

(ii) driving or being in actual physical control of a motor vehicle while under the influence of alcohol, any drug, or combination of them to a degree that renders the person incapable of safely driving a motor vehicle as prohibited in Section 41-6a-502 or as prohibited in an ordinance that complies with the requirements of Subsection 41-6a-510(1);

(iii) driving or being in actual physical control of a motor vehicle while having a blood or breath alcohol content prohibited in Section 41-6a-502 or as prohibited in an ordinance that complies with the requirements of Subsection 41-6a-510(1);

(iv) perjury or the making of a false affidavit to the division under this chapter, Title 41, Motor Vehicles, or any other law of this state requiring the registration of motor vehicles or regulating driving on highways;

(v) any felony under the motor vehicle laws of this state;

(vi) any other felony in which a motor vehicle is used to facilitate the offense;

(vii) failure to stop and render aid as required under the laws of this state if a motor vehicle accident results in the death or personal injury of another;

(viii) two charges of reckless driving committed within a period of 12 months; but if upon a first conviction of reckless driving the judge or justice recommends suspension of the convicted person's license, the division may after a hearing suspend the license for a

period of three months;

(ix) failure to bring a motor vehicle to a stop at the command of a peace officer as required in Section 41-6a-210;

(x) any offense specified in Part 4, Uniform Commercial Driver License Act, that requires disqualification;

(xi) discharging or allowing the discharge of a firearm from a vehicle in violation of Subsection 76-10-508(2);

(xii) using, allowing the use of, or causing to be used any explosive, chemical, or incendiary device from a vehicle in violation of Subsection 76-10- 306(4)(b);

(xiii) operating or being in actual physical control of a motor vehicle while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6a-517;

(xiv) until July 30, 2015, operating or being in actual physical control of a motor vehicle while having any alcohol in the person's body in violation of Section 53-3-232;

(xv) operating or being in actual physical control of a motor vehicle while having any measurable or detectable amount of alcohol in the person's body in violation of Section 41-6a-530; and

(xvi) engaging in a motor vehicle speed contest or exhibition of speed on a highway in violation of Section 41-6a-606.

(b) The division shall immediately revoke the license of a person upon receiving a record of an adjudication under Title 78, Chapter 3a, Juvenile Court Act of 1996, for any of the following offenses:

(i) discharging or allowing the discharge of a firearm from a vehicle in violation of Subsection 76-10-508(2); and

(ii) using, allowing the use of, or causing to be used any explosive, chemical, or incendiary device from a vehicle in violation of Subsection 76-10-306(4)(b).

(c) Except when action is taken under Section 53-3-219 for the same offense, the division shall immediately suspend for six months the license of a person upon receiving a record of conviction for any of the following offenses:

(i) any violation of:

(A) Title 58, Chapter 37, Utah Controlled Substances Act;

(B) Title 58, Chapter 37a, Utah Drug Paraphernalia Act;

(C) Title 58, Chapter 37b, Imitation Controlled Substances Act;

(D) Title 58, Chapter 37c, Utah Controlled Substance Precursor Act; or

(E) Title 58, Chapter 37d, Clandestine Drug Lab Act; or

(ii) any criminal offense that prohibits:

(A) possession, distribution, manufacture, cultivation, sale, or transfer of any substance that is prohibited under the acts described in Subsection (1)(c)(i); or

(B) the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell, or transfer any substance that is prohibited under the acts described in Subsection (1)(c)(i).

(2) The division shall extend the period of the first denial, suspension, revocation, or disqualification for an additional like period, to a maximum of one year for each subsequent occurrence, upon receiving:

(a) a record of the conviction of any person on a charge of driving a motor vehicle while the person's license is denied, suspended, revoked, or disqualified;

(b) a record of a conviction of the person for any violation of the motor vehicle law in which the person was involved as a driver;

(c) a report of an arrest of the person for any violation of the motor vehicle law in which the person was involved as a driver; or

(d) a report of an accident in which the person was involved as a driver.

(3) When the division receives a report under Subsection (2)(c) or (d) that a person is driving while the person's license is denied, suspended, disqualified, or revoked, the person is entitled to a hearing regarding the extension of the time of denial, suspension, disqualification, or revocation originally imposed under Section 53-3-221.

(4)(a) The division may extend to a person the limited privilege of driving a motor vehicle to and from the person's place of employment or within other specified limits on recommendation of the trial judge in any case where a person is convicted of any of the offenses referred to in Subsections (1) and (2) except:

(i) automobile homicide under Subsection (1)(a)(i);

(ii) those offenses referred to in Subsections (1)(a)(ii), (a)(iii), (a)(xi), (a)(xii), (a)(xiii),

(1)(b), and (1)(c); and

(iii) those offenses referred to in Subsection (2) when the original denial, suspension, revocation, or disqualification was imposed because of a violation of Section 41-6a-502, 41-6a-517, a local ordinance which complies with the requirements of Subsection 41-6a-510(1), Section 41-6a-520, or Section 76-5-207, or a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one or more of these sections or ordinances.

(b) This discretionary privilege is limited to when undue hardship would result from a failure to grant the privilege and may be granted only once to any individual during any single period of denial, suspension, revocation, or disqualification, or extension of that denial, suspension, revocation, or disqualification.

(c) A limited CDL may not be granted to an individual disqualified under Part 4, Uniform Commercial Driver License Act, or whose license has been revoked, suspended, cancelled, or denied under this chapter.

Utah Code Ann. § 53-3-223

(1)(a) If a peace officer has reasonable grounds to believe that a person may be violating or has violated Section 41-6a-502, prohibiting the operation of a vehicle with a certain blood or breath alcohol concentration and driving under the influence of any drug, alcohol, or combination of a drug and alcohol or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6a-517, the peace officer may, in connection with arresting the person, request that the person submit to a chemical test or tests to be administered in compliance with the standards under Section 41-6a-520.

(b) In this section, a reference to Section 41-6a-502 includes any similar local ordinance adopted in compliance with Subsection 41-6a-510(1).

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that a test result indicating a violation of Section 41-6a-502 or 41-6a-517 shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a motor vehicle may, result in suspension or revocation of the person's license to drive a motor vehicle.

(3) If the person submits to a chemical test and the test results indicate a blood or breath

alcohol content in violation of Section 41-6a-502 or 41- 6a-517, or if a peace officer makes a determination, based on reasonable grounds, that the person is otherwise in violation of Section 41-6a-502, a peace officer shall, on behalf of the division and within 24 hours of arrest, give notice of the division's intention to suspend the person's license to drive a motor vehicle.

(4)(a) When a peace officer gives notice on behalf of the division, the peace officer shall:

(i) take the Utah license certificate or permit, if any, of the driver;

(ii) issue a temporary license certificate effective for only 29 days from the date of arrest; and

(iii) supply to the driver, in a manner specified by the division, basic information regarding how to obtain a prompt hearing before the division.

(b) A citation issued by a peace officer may, if provided in a manner specified by the division, also serve as the temporary license certificate.

(5) As a matter of procedure, a peace officer shall send to the division within ten calendar days after the day on which notice is provided:

(a) the person's license certificate;

(b) a copy of the citation issued for the offense;

(c) a signed report in a manner specified by the division indicating the chemical test results, if any; and

(d) any other basis for the peace officer's determination that the person has violated Section 41-6a-502 or 41-6a-517.

(6)(a) Upon request in a manner specified by the division, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest. The request to be heard shall be made within ten calendar days of the day on which notice is provided under Subsection (5).

(b)(i) Except as provided in Subsection (6)(b)(ii), a hearing, if held, shall be before the division in the county in which the arrest occurred.

(ii) The division may hold a hearing in some other county if the division and the person

both agree.

(c) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe the person was driving a motor vehicle in violation of Section 41-6a-502 or 41-6a-517;

(ii) whether the person refused to submit to the test; and

(iii) the test results, if any.

(d)(i) In connection with a hearing the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; or

(B) may issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 78-46-28.

(e) The division may designate one or more employees to conduct the hearing.

(f) Any decision made after a hearing before any designated employee is as valid as if made by the division.

(g) After the hearing, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(h) If the person for whom the hearing is held fails to appear before the division as required in the notice, the division shall order whether the person's license to drive a motor vehicle is suspended or not.

(7)(a) A first suspension, whether ordered or not challenged under this Subsection (7), is for a period of 90 days, beginning on the 30th day after the date of the arrest.

(b) A second or subsequent suspension for an offense that occurred within the previous ten years under this Subsection (7) is for a period of one year, beginning on the 30th day after the date of arrest.

(8)(a) The division shall assess against a person, in addition to any fee imposed under Subsection 53-3-205(13) for driving under the influence, a fee under Section 53-3-105 to cover administrative costs, which shall be paid before the person's driving privilege is reinstated. This fee shall be cancelled if the person obtains an unappealed division

hearing or court decision that the suspension was not proper.

(b) A person whose license has been suspended by the division under this section may file a petition within 30 days after the suspension for a hearing on the matter which, if held, is governed by Section 53-3-224.